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No. 01-495

In the Supreme Court of the United States

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,
v.
CALVIN JEROLD BURDINE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

On December 10, 2001, the Court agreed to review the Sixth Circuit's decision in *Cone v. Bell*, 243 F.3d 961 (CA6 2001), *cert. granted*, 70 U.S.L.W. 3164 (Dec. 10, 2001) (No. 01-400). Like *Burdine*, *Cone* presents the question of when, if ever, an attorney's deficient performance at trial constitutes a presumptive Sixth Amendment violation under *United States v. Cronic*, 466 U.S. 648 (1984). Although *Cone* involves a different factual context than *Burdine*, the Court's grant of certiorari in *Cone* should, at the very least, encourage the Court to hold the petition in *Burdine* pending its decision in *Cone*.

The specific question presented in *Cone* is whether prejudice should be presumed when an attorney renders deficient performance by failing to present mitigating evidence and jury argument during the penalty phase of a capital murder trial. *See*

Cone, 243 F.3d, at 977. The Sixth Circuit answered that question in the affirmative, reasoning that counsel's deficient performance at sentencing entirely failed to subject the prosecution's case to "meaningful adversarial testing," and also constructively deprived the defendant of counsel during a "critical stage" of the proceedings. *Id.*, at 979 (citing *Cronic*, 466 U.S., at 656). The Sixth Circuit therefore *presumed* prejudice and, consequently, did not inquire whether counsel's errors at sentencing demonstrated a reasonable probability that, but for the errors, the result of the sentencing proceeding would have been different. *Cf. Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). The Court will determine whether the Sixth Circuit correctly presumed prejudice under those circumstances.

As in *Cone*, the en banc Fifth Circuit determined in *Burdine* that an attorney's deficient performance—based on undetermined, intermittent dozing and sleeping during trial—resulted in an automatic presumption of prejudice, without any showing that counsel's error actually undermined the outcome of trial. *See Burdine* Pet. for Cert., at i, 6-7; *Burdine v. Johnson*, 262 F.3d 336, 338, 346-47 (CA5 2001) (en banc). Also, like *Cone*, *Burdine* asks whether counsel's errors implicate the "constructive denial of counsel" during a "critical stage of the proceedings" under *Cronic*. *See Burdine* Pet. for Cert., at 6; *Burdine*, 262 F.3d, at 338.

Because of the similarities in the Sixth Amendment questions presented by *Cone* and *Burdine*, if it does not grant certiorari in *Burdine*, the Court should hold *Burdine* pending its resolution of *Cone*.

Respectfully submitted,

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